Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court Of The United States

October Term, 1998

JEROME BERG,

Petitioner,

vs.

CALIFORNIA COURT OF APPEAL

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the federal district court have jurisdiction to declare unconstitutional and enjoin state court "sanction" procedure which does not give specific notification of the factual basis for the sanction or the amount of sanction being sought in violation of due process?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE NINTH CIRCUIT

Jerome Berg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit

I. OPINIONS BELOW

The appended November 20, 1998 memorandum opinion of the Ninth Circuit Court of Appeals (App. 1), and the February 3, 1999 order denying rehearing are (App. 5).

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this Civil Rights Act claim pursuant to 28 U.S.C. § 1343(a)(3). The Court of Appeal had jurisdiction pursuant to 28 U.S.C. § 1291.

III. CONSTITUTIONAL PROVISIONS INVOLVED

The 11th Amendment accords immunity to state agencies for their constitutional acts.

IV. REASON *CERTIORARI* SHOULD BE GRANTED

The grant of *certiorari* would immunize litigants in all the state courts from the stealth virus of sanctions without due process notice.

Sanctions in federal courts are governed by explicit due process requirements. See Federal Rule of Civil Procedure Rule 11 which is now operative in the bankruptcy court under recently revised Bankruptcy Rule 9011. Former Federal Rules of Appellate Procedure, Rule 38 was revised in 1994 to require a noticed motion before a sanction can be imposed.

No uniform rule now prevents state courts from imposing sanctions without a fair notice of what is considered objectionable and what penalty is being considered.

A sanction procedure can arise in any litigation context. Examination of the grounds for the sanction requires analysis of the underlying issues. That is not the subject of this petition. No federal court has jurisdiction to second guess the *grounds* for sanction because of 11th Amendment immunity, but second guessing state court decisions on issues of substantive law is not the object of this suit.

If a state punitive *procedure* violates due process there is no need to examine the grounds. The question is whether the punitive process is fair, not if the grounds are adequate. Thus, no question of state substantive law is intertwined with the attack on the procedure. The grounds for sanction and the nature of the sanction are both irrelevant when a federal court is asked to adjudicate and declare that the sanction *procedure* violates due process rights to an adequate notice.

V. STATEMENT OF THE FACTS

A. The Inadequate Notice

Just before oral argument on an appeal in the state court, that court issued a notice letter that it was considering the imposition of sanctions for a frivolous appeal. The notice letter (App. 7) did not identify which of the various appeal issues[1] or what specific conduct of appellant might be considered frivolous. This is the entire text of that notice:

> Dear Counsel:
> In accordance with the procedural requirements

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[1] Paragraph 5(c) of the first amended complaint (E.R. 15:24-16:13) alleges, "plaintiff advanced more than half a dozen legal theories ...." Seven theories are outlined at E.R. 16:2-13.

> of In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 651-4 you are hereby advised that at oral argument in this matter scheduled for Wednesday January 24, 1996 at 9 a.m., the court will consider the propriety of imposing sanctions upon appellant pursuant to Code of Civil Procedure section 907 and rule 26(a) of the California Rules of Court for his filing of a frivolous appeal. The parties should be prepared at that time to present argument and to respond to the court's questions concerning this issue.

This notice says nothing about which topic(s) are considered frivolous and nothing about the nature of the sanction being considered.

B. The Constitutional Question Was Raised In The State Court And In The District Court, But Not Adjudicated

Immediately at oral argument and in a post-hearing letter brief petitioner raised the federal constitutional issue of inadequacy of the notice. The California Court of Appeal did not adjudicate the issue of inadequacy of the notice for failure to specify which of petitioner's theories was "frivolous" or what sanction was being sought, actually the state Court of Appeal declined to adjudicate that question, writing only:

> Pursuant to respondent's request to impose sanctions for bringing this frivolous appeal, we noticed a hearing on this issue at which time

> appellant was afforded an opportunity to respond, as required by In re Marriage of Flaherty, *supra*, 31 Cal. 3d at page 654.

(E.R. 27)

C. The Sanction Decision's Criticisms Of Some Of Petitioner's Theories On Appear Are Irrelevant To The Defective Notice

The state court sanction-imposing decision went on to discuss and belittle some of petitioner's grounds for the state court appeal and to explain how heavy the sanction had to be, and why. But issues on which the law favored petitioner were not discussed in the decision. That discussion is irrelevant to the defective sanction notice. That discussion only shows that the notice could have been more explicit.

The state court decision conspicuously omits to say that the adverse party did not notice a motion for sanctions (which is the state's jurisdictional condition precedent for sanctions payable to a litigant as expressed in California Rules of Court, Rule 26(e)). Equal protection demands that rules must be applied "with an even hand." Rinaldi v Yeager 384 U.S. 305,

310-11 [86 S.Ct. 1497, 1501] (1966), but the California Court of Appeal made a sanction award to the opposing litigant who did not file a Rule 26(e) motion. That improper order is not the subject of this petition or the district court suit.

D. A Suit For Declaratory Relief; No Money Requested

The within suit seeking declaratory and injunctive relief contends that notice was issued in violation of federal due process standards because the notice letter gave no clue about the specific concepts advanced by the appellant's briefs which the court considered offensive so that a focused response could be made to defend the contentions which were under attack, and no notice was given about whether the sanction under consideration was trivial or substantial.

No money was requested as damages in the district court declaratory injunction relief suit.

E. Subject Matter Jurisdiction. Notice Letter Is Not Intertwined With State Law Issues

The memorandum opinion of November 20, 1998 at App. 2 is based on a concept not supported by the simple facts in the case. The fact is that petition received a letter notice of a

sanction hearing (App. 7) which does not say which of half a dozen theories raised by his appeal may be sanctionable, and it does not say what the sanction may be. The circuit court (App. 2) found the sanction letter, "inextricably intertwined" with the state court decision, but it is not, and the circuit court did not explain why it thought there was intertwinement with the case's substantive issues. The realtiy of sanctions proceedings is they are always satellites to the substantive issues. See 5A *Federal Practice & Procedure* § 1332 p. 30 n. 37.

VI. SUMMARY OF THE ARGUMENT

The Rooker/Feldman[2] line of cases based on the Ex Parte Young[3] exception to the 11th Amendment state immunity establishes that the district court has jurisdiction to declare unconstitutional state procedures which violate the federal constitution. Petitioner attacks a one page notice because it fails the due process test. The merits of the subject which evoked the sanction is irrelevant, not "intertwined" with the

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[2] Rooker v Fidelity Trustees, 263 U.S. 413, 415-416 (1923), and District of Columbia Court of Appeals v Feldman 460 U.S. 462 [103 S.Ct. 1303] (1983)

suit's sole focus, a procedural grievance addressed to a defective notice.

VII. ARGUMENT

A. Analysis Of The Complaint Under Young (*supra*) Criteria

1. Declaratory Relief Sought

The complaint herein seeks prospective relief declaring unconstitutional and enjoining proceedings based on a notice of possible sanction which fails to give federal due process warning of what theory was found wanting in plaintiff's multi-theory state appeal and what penalty was contemplated. See the notice requirement in Wolff v McDonnell, 418 U.S. 539, 564 [94 S.Ct. 2963, 2978] (1974), "to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact." *(Id.)*

2. Federal Due Process Rights to an Adequate Notice

In Morgan v. United States, 304 U.S. 1, 18-19 [58 S.Ct.

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[3] 209 U.S. 123 [28 S.Ct. 442], 52 L.Ed. 714 (1908)

773] (1937), the Court stated:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes before it issues its final command.

(304 U.S. at 18-19.)

To satisfy procedural due process, a deprivation of life, liberty, or property must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Board of Education v Loudermill, 470 U.S. 532, 542 [105 S.Ct. 1487, 1493] (1984).

In re Ruffalo 390 U.S. 544, 552 [88 S.Ct. 1222] (1968) affirms the right to notice which includes, "the precise nature of the charges," as required by federal due process concepts.

3. Unconstitutional Conduct Is Not "State Action"

In Seminole Tribe of Florida v Florida, (1996) 116 S.Ct. 114 the Constitution's Supremacy Clause, the Eleventh

Amendment, Article III state immunity from federal suit, and the Ex Parte Young (*supra*) exception were reviewed. Justice Souter's analysis at 116 S.Ct. 1179 states the doctrine in a nutshell:

> . . . state officers never have authority to violate the Constitution or federal law, so that any illegal action is stripped of state character and rendered an illegal individual act. Suits against these officials are consequently barred by neither the Eleventh Amendment nor Hans[4] immunity.

VIII. CONCLUSION AND PRAYER

This is a narrow case on an imporant point at the heart of judicial administration. Within its thrifty confines a brief and uncontestable idea can be expressed. No sanctions should be allowed in state court without a detailed notice of grounds *and* possible penalties.

Certiorari should be granted.

Date: April 30, 1999

Jerome Berg

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[4] Hans v Louisiana (1890) 134 U.S. 1 [10 S.Ct. 504]

App. 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME BERG, Esq.

Plaintiff-Appellant,

v.

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT; CHARLES MOORE, JOANNA LEIGHTON,

Defendants-Appellees.

_____/

No. 97-15074

Filed November 20, 1998

D.C. No. CV-96-03473-SI

Northern California

(San Francisco)

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California Susan Illston, District Judge, Presiding

_____

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

App. 2

Submitted November 16, 1998**

Before: FARRIS, BRUNETTI, and SILVERMAN, Circuit Judges.

Jerome Berg appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action alleging due process violations arising from a letter he received from the California Court of Appeal in a state court action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the existence of subject matter jurisdiction, *see Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989), and we affirm.

The district court correctly dismissed the action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486-87 (1983) (recognizing that it is impermissible for district courts to evaluate constitutional claims "inextricably intertwined" with state court decisions); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed R App P 34(a) 9th Cir R 34-4

The district court also properly dismissed the purported 42 U.S.C. § 1983 claims against the remaining parties because Berg failed to adequately allege that they acted together with or obtained significant aid from a state official, *see Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982), to deprive him of his rights secured by the United States Constitution or federal statute, *see Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

Appellees have moved for just damages and double costs under Fed. R. App. P. 38, contending that Berg frivolously appealed the district court's decision. While this court has discretion to impose damages and costs for bringing a frivolous appeal, even where a litigant is pro se, *see Urban v. Commissioner*, 964 F.2d 888, 890 (9th. Cir. 1992) (per curiam), we do not impose sanctions lightly since an appeal that lacks merit is not always frivolous, *see Grimes v. Commissioner*, 806 F.2d 1451, 1454 (9th Cir. 1986) (per curiam). Although Berg's arguments are clearly without merit, we decline to award damages and costs.

We decline Berg's request to take judicial notice of the

state court documents he submitted.

The clerk shall file appellees' answering brief and appellant's reply brief which were received on March 27,1997, and April 9,1997, respectively.

AFFIRMED.

App. 5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME BERG, Esq.

Plaintiff-Appellant,

v.

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT; CHARLES MOORE, JOANNA LEIGHTON,

Defendants-Appellees.

_____/

No. 97-15074

Filed February 3, 1999

D.C. No. CV-96-03473-SI

Northern California

(San Francisco)

ORDER

Before: FARRIS, BRUNETTI, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Brunetti and Silverman have voted to reject the suggestion for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Accordingly, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. No further filings will be accepted in this closed appeal.

App. 7

STATE COURT OF APPEAL
FIRST APPELLATE DISTRICT
OFFICE OF THE CLERK

January 18, 1996

To Counsel:

Re: In re Marriage of Joanne and Jerome Berg (A064914)

Dear Counsel:

In accordance with the procedural requirements of In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 651-654, you are hereby advised that at oral argument in this matter, scheduled for Wednesday, January 24, 1996, at 9 AM, the court will consider the propriety of imposing sanctions upon appellant pursuant to Code of Civil Procedure § 907 and rule 26(a) of the California Rules of Court for his filing of a frivolous appeal. The parties should be prepared at that time to present argument and to respond to the court's questions concerning this issue.

Very truly yours,

RON D. BARROW

Clerk of the Court

/s/ SUSAN GRAHAM

Deputy Clerk